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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 1052

ANTHONY SIRIMARCO, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No.

ANTHONY SIRIMARCO, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Anthony Sirimarco, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on January 15, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals, filed January 15, 1963, is printed in Appendix A hereto, page 13a. The dissent on Petition for Rehearing En Banc, filed March

20, 1963, is printed in Appendix A hereto, page 19. The Journal Entry of Judgment is printed in Appendix A hereto, page 22.

JURISDICTION

The judgment of the Court of Appeals was entered January 15, 1963, (*infra*, Appendix A, page 22). Rehearing was denied March 20, 1963, (*infra*, Appendix A, page 23). The jurisdiction of the Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED

1. Where a government agent had information constituting probable cause to believe that a suspect had committed the federal offense of passing a counterfeit bill and that the suspect's vehicle was used to transport said counterfeit bill, may said agent, pursuant to seizure powers conferred by 49 U.S.C.A. 783, search said vehicle and seize evidence therein without a search warrant, or consent, and not incidentally to a lawful arrest, although there was no likelihood that said automobile would be moved or molested until a search warrant could have been obtained?

2. Adding to Question 1 the fact that the government agent did not assert his powers of seizure under 49 U.S.C.A. 783 until after he discovered evidence inside the vehicle, was the search and seizure lawful?

STATUTES INVOLVED

Article IV of the Constitution of the United States:

"*Searches and seizures regulated.*—The right of the people to be secure in their persons, houses, papers

and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

18 U.S.C.A. 472:

"*Uttering Counterfeit obligations or securities.* — Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

49 U.S.C.A. Section 781 provides, so far as is here relevant:

"*Unlawful use of vessels, vehicles, and aircrafts; contraband article defined.* —

(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

"(b) As used in this section, the term 'contraband article' means —

"(1) Any narcotic drug . . .

"(2) Any firearm . . .

"(3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used or which shall have been used, in the making of any falsely made, forged, altered, or counterfeit coin or obligation or other security."

49 U.S.C.A. Section 782 provides, so far as is here relevant:

"*Seizure and forfeiture.*—Any . . . vehicle . . . which has been or is being used in violation of any provision of Section 781 of this title, or in, upon, or by means of which any violation of Section 781 of this title has taken or is taking place, shall be seized and forfeited . . ."

49 U.S.C.A. Section 783:

"*Designation of officers by Secretary of Treasury; duties of officers.*—The Secretary of the Treasury is empowered to authorize, or designate, officers, agents or other persons to carry out the provisions of this chapter. It shall be the duty of any officer, agent, or other person so authorized or designated, or authorized or designated, or authorized by law, whenever he shall discover any vessel, vehicle, or aircraft which has been or is being used in violation of any of the provisions of this chapter, or in, upon, or by means of which any violation of this chapter has taken or is taking place, to seize such vessel, vehicle,

or aircraft and to take it in the custody of such person as may be authorized or designated for that purpose by the Secretary of the Treasury, to await disposition pursuant to the provisions of this chapter and any regulations issued hereunder."

STATEMENT OF THE CASE

Petitioner was convicted (4)* upon each of two counts of an indictment (1-2) charging, in Count 1, the uttering of a counterfeit $20 Federal Reserve Note and, in Count 2, the possession of 29 counterfeit Federal Reserve Notes, all in violation of 18 U.S.C.A. 472. He was sentenced to concurrent terms of four years upon each count (4).

The error asserted before the Court of Appeals was that the trial court had erred in denying Petitioner's Motion to Quash Evidence (6, 25, 34-36).

On April 21, 1961, Petitioner drove up to a restaurant near Starkville, Colorado, in an automobile bearing New Jersey plates, ate lunch and paid for the meal with a counterfeit note and then drove off (8-11). The restaurant owner immediately discovered the counterfeit nature of the note and swore out a complaint charging a violation of Colorado State law (23). A warrant was issued. Information of the incident and the existence of a Colorado complaint and warrant was radioed to New Mexico state authorities. Petitioner was arrested by New Mexico police near Raton, New Mexico who searched his car, finding nothing, and held him for Colorado (20-23). On the same day, Colorado officers, armed with copies of the

*Reference in this form is to the Transcript of the Record before the Court of Appeals, nine copies of which are lodged herewith.

warrant and complaint, took Petitioner back to Trinidad, Colorado, and placed him in jail (22-23). A Federal Secret Service Agent at Denver, Colorado, was then informed that Petitioner was in custody (29-30).

The Secret Service agent, *the next day*, arrived in Trinidad, talked to the authorities, inspected the counterfeit bill, determining it to be counterfeit, and thereupon searched Petitioner's car. The car was parked at the side of the courthouse adjacent to the County Sheriff's office, and Petitioner was securely in jail (31-32). Neither the agent, nor anyone else had a search warrant (15, 31-32). The agent discovered 29 counterfeit bills secreted in the front seat of the car (25). Petitioner had not consented to the search (25). The agent testified that he seized the car subsequently to the search by informing petitioner that he was so seizing the car (32).

Petitioner moved the trial court to suppress the fruits of this search, the motion was denied (25,34-36), and this was specified as error to the Court of Appeals (6).

A panel of three justices of the Court of Appeals affirmed the conviction, holding that, although "probable cause alone is not justification for a search without warrant (A. 15)", and although there is "no rule justifying a federal search made as incident to a state arrest (A. 15)", the "existence of probable cause is justification for the seizure of a vehicle (A. 15)" used to transport contraband, pursuant to 49 U.S.C.A. 781(3) and 783. A vehicle which may be so seized "may be searched without a warrant or consent (A. 16)". The fact that the agent believed he seized the car after the search had no

*Reference in this form is to Appendix A.

hearing because he "had probable cause to seize the vehicle and the legality of his actions are not affected by his subjective beliefs (A. 18)".

On Petition for Rehearing En Banc (A. 19), the full court denied rehearing (A. 23), but two judges, including Judge Murrah who was on the original panel, dissented (A. 19). The Court of Appeals granted a stay of Mandate for the filing of this Petition (A. 23).

REASONS FOR GRANTING THE WRIT

1. *The decision of the Court of Appeals has seriously encroached upon the protections of the Fourth Amendment to the Constitution of the United States.*

After due reconsideration, Judge Murrah has written:

"The effect of this decision is to hold that officers may seize without a warrant for probable cause that which they could not search for probable cause. . . . If this decision is now to be the law of search and seizure, officers need no longer trouble themselves to secure a search warrant for the seizure of a vehicle, be it standing or moving, for all they need to do is to decide for themselves whether there is probable cause to believe that it is being used to violate the federal law. . . .

"As I now view this decision, it opens up a new loophole for stealthy encroachment on the citizen's fundamental right to privacy . . ." (A. 21)

The decision cannot be construed as limited to automobiles, but covers "any vessel, vehicle, or aircraft"

which a Treasury agent may seize pursuant to 49 U.S.C.A. 783. And the decision is not limited to moving transport, the subject of *Carroll v. United States*, 267 U.S. 132 and *Brinegar v. United States*, 338 U.S. 160, but to a car which has been for a day immobile outside the very courthouse where a search warrant might be applied for, with the accused driver in jail.

The existence of probable cause alone has never before been justification for a search without a warrant. *McDonald v. United States*, 335 U.S. 451; *Johnson v. United States*, 333 U.S. 10; *Chapman v. United States*, 365 U.S. 610. Now, as to vessels, vehicles, and aircraft suspected to have carried contraband, probable cause alone is such justification. In such instances, and they will prove countless, the citizen is left secure only in the discretion of Treasury agents.

The decision amends the Fourth Amendment to provide:

> ". . . *except* that any duly authorized agent of the Secretary of the Treasury may, without such Warrant, search any vessel, vehicle, or aircraft which he has probable cause to believe has been used to transport contraband." (See 49 U.S.C.A. 783.)

2. *The decision is in conflict with a decision of the Court of Appeals for the Fifth Circuit.*

The contention that, because a Federal officer possesses the power to seize an automobile carrying contraband, under 49 U.S.C.A. 781, he may search said automobile without a warrant, was squarely rejected in *Reed v. United States*, 5 Cir. 1954, 209 F. 2d 893.

In *Bent*, the appellant was charged with possession of marijuana without having paid the transfer tax. Federal narcotics officer Griffin observed appellant apparently smoking marijuana cigarettes in an automobile. The appellant was arrested and taken to jail by other officers, while Officer Griffin remained behind. At page 896:

> "Officer Griffin did not then 'seize' the automobile for transporting contraband. 19 U.S.C.A. Sections 781, 782, 787(d), but he did take the car into custody with the intention of searching it.' He parked it across the street from the nearby Tandem Lounge where it remained under his observation until about 1 A.M. . . . The automobile was then driven to the Houston Police Department parking lot, and locked. . . . An actual search of the car was not made until 10:30 the next morning. At that time, Officer Griffin found a package containing bulk marijuana concealed above the glove compartment of the car . . ."

Alluding to the difference, stated in *Carroll v. United States*, supra, between the search of a fixed site and a movable vehicle, the court said at 897:

> "The reason for that difference does not exist in this case. The automobile was at rest, was actually in the custody of the officers, locked, and not likely to be disturbed."

As in the instant case, the federal agents "did not consider that they had sufficient evidence to seize the

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*In the instant case, the agent was asked (32-

"Q. So you exercised the seizure around noon, is that correct"

"A. Yes, sir.

"Q. And you searched the car at 9:30 A.M.?

"A. Yes, sir."

automobile" until after the contraband was discovered therein. But the 5th Circuit Court conceded the possibility that sufficient probable cause existed beforehand to justify the car's seizure. At page 898:

> "That probable cause, coupled with other existing circumstances, *may very well have authorized the officers to take the car into custody*, but we do not think that it justified him in searching the automobile a number of hours after the arrest and without a search warrant for which an application could then have easily been made." (Emphasis supplied.)

At 899:

> "We think that one of the factors and circumstances to be considered in this case is the fact that there was no reason for not submitting to a magistrate the evidence which the officer deemed sufficient to justify a search of the automobile. The need for effective law enforcement is not satisfied as against the right of privacy by any necessity for the officer to take the decision in his own hands. The officer had ample opportunity to apply for a search warrant and in our opinion a search of the automobile without a warrant was not justified."

The holding of *Rent*, in brief, was that although a federal agent may have had probable cause to seize an automobile believed to have transported contraband, that fact will not justify a search of the automobile where a search warrant could easily have been applied for. In the instant case, although the automobile was for a day a stone's throw from the magistrate's court which had issued the arrest warrant for the driver, probable cause justify

ing the agent's seizure of the automobile was sufficient for a search thereof without a search warrant.

3. *The decision further endangers Fourth Amendment protections in that it permits the federal agent to search the vehicle without a warrant before he invokes seizure powers under* 49 *U.S.C.A.* 783.

Assuming the Court of Appeals was right: a federal agent who may seize an automobile under 49 U.S.C.A. 783 may search it in any circumstances, may he invoke that statute at the time of the trial although he did not at the time of the search? This was the problem with which the Court of Appeals wrestled, for the agent admitted (32) that he first searched the car and then seized it.

The opinion approaches the problem cryptically. It states (A. 17-18):

> "He (the agent) intended to do what he did and his actions constituted a continuous course of conduct. The conduct was justified because the agent had probable cause to seize the vehicle and the legality of his actions *are not affected by his subjective beliefs.*" (Emphasis supplied)

However, the agent's subjective beliefs alone were not involved. He actually exercised no seizure until he asserted a claim against the owner of the vehicle, which he did after the search (32):

> "Q. *How did you exercise that seizure?* A. *When I spoke to Mr. Sirimarco.*
>
> "Q. What did you say? A. *I told him that his car was being seized.*

"Q. When did you say that? "A. Around noon.

"Q. So you exercised the seizure around noon, is that correct? "A. Yes, sir.

"Q. And you searched the car at 9:30 a.m.?

"A. Yes, sir." (Emphasis supplied.)

Consequently, the Court of Appeals was forced to say that the search itself was an act of seizure of the vehicle as well as the fact that the agent "seized contraband." (A. 17). Thus, under this view of 49 U.S.C.A. 783, an agent may search a car, and, if he finds contraband, he has effected a seizure retroactive to the beginning of the search. This, we submit runs afoul of the decisions of this Court that a search is not justified by the evidence it produces. *Rochin v. California*, 342 U.S. 165.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7043 — January Term, 1962

Anthony Sirimarco,

Appellant,

vs.

United States of America,

Appellee.

Appeal from the United States District Court for the District of Colorado

Eugene Deikman for Appellant.

James A. Clark, Assistant United States Attorney, (Lawrence M. Henry, United States Attorney, with him on the brief) for Appellee.

Before Murrah, Chief Judge and Lewis and Seth, Circuit Judges. Lewis, Circuit Judge.

Sirimarco was convicted upon each of two counts of an indictment charging, in Count 1, the uttering of a counterfeit $20 Federal Reserve Note and, in Count 2, the possession of twenty-nine counterfeit Federal Reserve Notes, all in violation of 18 U.S.C.A. 472. He was sentenced to concurrent terms of four years upon each count. He appeals, contending that the court improperly admitted into evidence twenty-nine counterfeit notes that had been obtained by the government as the result of an unlawful

search and seizure. There is no critical dispute in the evidence.

On April 21, 1961, Sirimarco drove up to a restaurant near Starkvile, Colorado, in an automobile bearing New Jersey plates, ate lunch and paid for the meal with a counterfeit note and then drove off. The restaurant owner immediately discovered the fraud and swore out a complaint charging a violation of Colorado state law. A warrant was issued. Information of the incident was radioed to New Mexico state authorities. Sirimarco was picked up in a road block near Raton, New Mexico, arrested by the New Mexico police and held for Colorado. His car was searched by the New Mexico officers at the time of arrest but nothing was discovered or seized. On the same day, Colorado officers, armed with identification and copies of the warrant and complaint, took Sirimarco and his car back to Trinidad, Colorado, and placed him in jail. Federal authorities at Denver, Colorado, were then informed that Sirimarco was in custody.

The next day, a Denver agent of the Secret Service arrived in Trinidad, talked to Colorado authorities, inspected the counterfeit bill and determined for himself that it was counterfeit, and thereupon searched Sirimarco's car. He discovered and seized twenty-nine additional counterfeit bills secreted in the front seat of the vehicle. At such time Sirimarco was not under federal arrest, had not consented to a search of his vehicle, and no warrant was obtained.

Appellant in attacking, and the government in defending, the ruling of the trial court admitting into evidence the fruits of the subject search argue at length relative

to the law of search as an incident to lawful arrest. Appellant asserts that the action of the Colorado officers in entering New Mexico and taking Sirimarco back to Colorado without extradition proceedings was an extra-territorial and unlawful arrest. In adopting such premise appellant totally ignores (as does the government), the interstate compact existing between the states of New Mexico and Colorado. NMS 1953, 41-20-1; C.R.S. 1953, 74-3-1 to 8. But even if the Colorado arrest was lawful, and we believe it was, we know of no rule justifying a federal search made as incident to a state arrest. Here there was no federal arrest and the search was conducted by the federal agent. In fact the Colorado police had waited for the federal agent's arrival for the very purpose of allowing him to conduct the search. It seems clear that the validity of the subject search is not properly tested against the background of the Colorado arrest and that counsels' emphasis upon this aspect of the case is misdirected.

Before making the search the government agent had information which constituted probable cause for him to believe that Sirimarco had committed the federal offense of passing a counterfeit bill and, further, that the vehicle had been used to transport or facilitate the transportation or possession of a counterfeit bill. The existence of probable cause alone is not justification for a search without warrant. McDonald v. United States, 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 153; Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436; Chapman v. United States, 365 U.S. 610, 81 S. Ct. 776, 5 L. Ed. 828. But the existence of probable cause is justification for the seizure of a vehicle which has been used to transport or facilitate the transportation or possession of contraband so designa-

nated by statue. Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543; Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879. Counterfeit money is designated as contraband, 49 U.S.C.A. 781(3) and the provisions of sec. 783 provide:

> ". . . It shall be the duty of any officer, agent, or other person so authorized or designated, or authorized by law, whenever he shall discover any vessel, vehicle, or aircraft which has been or is being used in violation of any of the provisions of this chapter, or in, upon, or by means of which any violation of this chapter has taken or is taking place, to seize such vessel, vehicle, or aircraft and to place it in the custody of such person as may be authorized or designated for that purpose by the Secretary of the Treasury, to await disposition pursuant to the provisions of this chapter and any regulations issued hereunder."

We have no doubt that a vehicle which has been lawfully seized pursuant to the mandate of sec. 783 may be searched without a warrant or consent of possessor or owner and that evidence so discovered may be properly admitted in prosecutions charged under 18 U.S.C.A. 472. And it is equally clear that evidence obtained through the unlawful search of a vehicle may not be admitted in such a prosecution. The question poised in the case at bar is thus whether or not it is necessary to explore the agent's intent and make a factual determination of which came first, the search or the seizure. We do not think this case turns upon such a nicety of fact or reasoning, under the totality of circumstances.[1]

[1]The trial court gave no supporting explanation for his ruling admitting the evidence but apparently based it upon grounds other than those we consider controlling. The only testimony relating to the seizure of the car is as follows:

The legality of a search cannot be balanced against the good faith of the searcher or the extent or correctness of his legal knowledge. An unlawful search, though made in the honest belief of right, remains unlawful and its fruits remain forbidden. A lawful search, though not made under subjective claim or knowledge of right, remains lawful and evidence so obtained is admissible. Here, the agent took control of the car, searched it, and seized contraband. He intended to do what he did and his actions

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(Continued)

"Q. What time did you make the search? A. I would say about 9:00 or 9:30 a.m.

"Q. What happened to the car when you left Trinidad?

"A. The car was left in the custody of the Sheriff's office.

"Q. Had you seized the car? A. Yes, I did.

"Q. When did you do that? A. At the time that I went to the car.

"Q. At the time you made the search of it?

"A. Yes, sir.

"Q. How did you exercise that seizure? A. When I spoke to Mr. Sirimarco.

"Q. What did you say? A. I told him that his car was being seized.

"Q. When did you say that? A. Around noon.

"Q. So you exercised the seizure around noon, is that correct?

"A. Yes, sir.

"Q. And you searched the car at 9:30 a.m.?

"A. Yes, sir.

"Q. So, at the time you searched the car, you had not seized it?

(No answer.)

"Mr. Fine: Your Honor, I didn't hear the answer to the question.

"The Court: Well, it is a matter of deduction, if he seized the car at 12 noon and he searched the car at 9:30, why, he seized it after he searched it.

"Mr. Fine: Well, I don't know, the witness was asked when he seized the car, and I didn't hear the answer, but I rose to object to the question on the ground there is no particular legal way you seize a car. You don't gather it to you, and I don't know that the witness—my question of the witness was did he intend to seize the car, which question he answered. I don't know that there is any prescribed form, and in effect my objection is that he asked the witness for a legal conclusion.

"The Court: The witness says he seized it and so certainly it is a proper question to ask him, 'When did you do it?' When a person says he did something, it is proper to ask him when. He must have something in his mind, the witness, as to when a seizure is made because he said he seized it. Your objection is overruled."

(But the question was never answered.)

consfituted a continuous course of conduct. The conduct was justified because the agent had probable cause to seize the vehicle and the legality of his actions are not affected by his subjective beliefs.

We conclude that the evidence was lawfully seized and properly admitted into evidence.

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Number 7043 — March, 1963, Term

Anthony Sirimarco, Appellant, vs. United States of America, Appellee.	Appeal from the United States District Court for the District of Colorado.

ON PETITION FOR REHEARING EN BANC

Before Murrah, Chief Judge, and Pickett, Lewis, Bratten, Hill and Seth, Circuit Judges.

Murrah, Dissenting.

I would grant the petition for rehearing because, upon reflection, I am convinced that the seizure and consequent search, or the search and consequent seizure, as the case may be, is not constitutionally sustainable.

When the vehicle was seized, or when the federal officer declared the same to have been seized, it was parked by the side of the courthouse adjacent to the County Sheriff's office, and the accused driver was securely in jail. There was no likelihood that the automobile would be

moved or in any way molested until judicial authority for the search and seizure could have been obtained. No reason or excuse is suggested for failure to obtain a search warrant.

It is conceded that probable cause alone did not authorize the search of the automobile without a warrant. Nor is the search and seizure sustained as an incident to a lawful arrest. Instead, the seizure is sustained on the authority of the statute which empowers federal officers to seize a vehicle which is subject to forfeiture for unlawful transportation of any contraband article. 49 USC 783. The opinion seems to find constitutional sanction for this statutory authority in Carroll v. United States, 267 U.S. 132; and Brinegar v. United States, 338 U.S. 160. Those cases do grudgingly sanction the authority of the officers to stop and search a moving vehicle without a warrant, based on probable cause to believe that it is being used to transport contraband goods and "where it was not practical to secure a warrant because the vehicle can be quickly moved out of the locality of the jurisdiction in which the warrant must be sought." But Carroll emphasized that "where the securing of a warrant is reasonable and practicable, it must be used." And, the courts have been careful to scrutinize every transaction to make sure, (1) the existence of probable cause; and (2) the impracticability of securing a search warrant. And see Hart v. United States, 162 F. 2d 74, and cases cited; United States v. One 1957 Ford Ranchero Pickup Truck, 265 F. 2d 21. The decisions do recognize a distinction between statutory authority to search and seize things which it is unlawful for a person to have in his possession, such as counterfeit money, and private property in lawful possession. But the distinction has no relevancy here, for it is significant

only when considered in connection with the prohibitions of the Fifth Amendment against self crimination. See Boyd v. United States, 116 U.S. 616, 624; Gouled v. United States, 255 U.S. 298; Weeks v. United States, 232 U.S. 383, 394; Silverthorne Lbr. Co. v. United States, 251 U.S. 385; Carrol v. United States, supra; and see Frankfurter dissenting in Davis v. United States, 328 U.S. 582, 612; Harris v. United States, 331 U.S. 145, 165.

The effect of this decision is to hold that the officers may seize without a warrant for probable cause that which they could not search for probable cause. And, having seized, they may then search for and seize contraband. I have found no authority to sanction this circumvention of the constitutional mandate which safeguards the citizen against unreasonable searches by requiring judicial authority in the form of a search warrant, except under circumstances which precludes its timely issuance. If this decision is now to be the law of search and seizure, officers need no longer trouble themselves to secure a search warrant for the seizure of a vehicle, be it standing or moving, for, all they need to do is to decide for themselves whether there is probable cause to believe that it is being used to violate the federal law. The only recourse of the citizen is a retrospective judicial review of the officers' determination when the thing seized is sought to be used against him in a prosecution.

As I now view this decision, it opens up a new loophole for stealthy encroachment on the citizen's fundamental rights to privacy a right which the courts have so jealously guarded, because, as Mr. Justice Jackson once said: "We must remember that the extent of any privilege of search and seizure without warrant which we sus-

tain, the officers interpret and apply themselves and will push to the limit. We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection." See dissent in Brinegar v. United States, supra, p. 182.

I am constrained to register my tardy protest.

Judge Hill concurs in the dissent.

JUDGMENT

Seventh Day, January Term, Tuesday, January 15th, 1963.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Anthony Sirimarco, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

ORDER DENYING PETITION FOR REHEARING EN BANC

Third Day, March Term, Wednesday, March 20th, 1963.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett, Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the petition for rehearing en banc and was considered by the court.

On consideration whereof, it is now here ordered that said petition for rehearing en banc be and the same is hereby denied. Judge Murrah filed a dissenting opinion. Judge Hill joins in the dissenting opinion.

By order of March 25, 1963, the mandate of the United States Court of Appeals was stayed for a period of thirty days under provision of paragraph 3 of rule 28 of said court.